

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN CLARK GOOD,

Plaintiff,

v.

Correctional Officer BORROSO; RN
MIKE BARKER; MD ROBERT
BOWMAN; and CALIFORNIA
DEPARTMENT OF CORRECTIONS,

Defendants.

No. C 08-3744 PJH (PR)

ORDER OF DISMISSAL

This is a civil rights case filed by a prisoner at Salinas Valley State Prison. He states in the complaint that he has not completed administrative exhaustion.

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Compliance with the exhaustion requirement is required. *Porter v. Nussle*, 122 S. Ct. 983, 992 (2002); *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5 (2001).

Nonexhaustion under § 1997e(a) is an affirmative defense – defendants have the burden of raising and proving the absence of exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint may be dismissed without prejudice if it is clear from the record that the prisoner has conceded that he or she did not exhaust administrative remedies. *Id.* If the court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without prejudice. *Id.* at 1120.

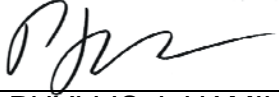
1 Plaintiff states on page two of his complaint that he has not completed the
2 administrative process. Because exhaustion must be completed *before* filing suit, not
3 afterwards, it thus is clear that the case must be dismissed. See *McKinney v. Carey*, 311
4 F.3d 1198, 1199 (9th Cir. 2002) (action must be dismissed if prisoner has not exhausted his
5 or her available administrative remedies *before* filing suit, even if prisoner fully exhausts
6 while suit is pending); *Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (where
7 administrative remedies are not exhausted before prisoner sends his complaint to the court,
8 case will be dismissed even if exhaustion is completed by time complaint is actually filed).

9 Plaintiff's complaint is **DISMISSED** without prejudice to filing a new case after
10 exhausting all available administrative remedies.

11 The clerk shall close the file.

12 **IT IS SO ORDERED.**

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14 Dated: April 8, 2009



PHYLLIS J. HAMILTON
United States District Judge

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